Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THE COUNTY OF COOK, THE CIVIL SERVICE COMMISSION OF COOK COUNTY, THE COOK COUNTY BOARD AND ITS COMMISSIONERS and OAK FOREST HOSPITAL,

Petitioners,

VS.

HAROLD J. CARSTON, MICHAEL DEWINTER, LAWRENCE J. DEWINTER, DEAN ECKBERG, DANIEL J. KOKASKA, DONALD MAREVKA, DENNIS MEZERA, JAMES S. OWCZARSKI, WILLIAM PROPER and WALTER S. SCAHILL,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The District Court issued a Memorandum Opinion and Order which the Seventh Circuit Court of Appeals upheld, granting former "merit employees" (Respondents herein), who worked for the Health and Hospitals Governing Commission (HHGC) at Oak Forest Hospital, Civil Service status when the Illinois Legislature abolished the HHGC and gave Cook County control over its hospitals. The District Court found that the Respondents' due process rights were violated when the Petitioners required them to take a Civil Service examination to show that they were qualified to maintain their positions at the Hospital.

This petition presents the following questions for review:

1. Did the Seventh Circuit Court err in affirming the award of summary judgment and in finding that the Respondents had a Fourteenth Amendment protected property right in their jobs even though Illinois law never created or provided for such a right when it abolished the HHGC and conferred responsibility for operating Cook County Hospitals to Cook County?

2. Did the Seventh Circuit Court err in affirming the award of summary judgment and in finding that the Respondents' property rights survived the legislative demise of the HHGC and were commuted to protected property rights in Cook County?

3. Did the Seventh Circuit Court err in finding that the Respondents' due process rights were violated?

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Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioners respectfully request this Court to issue a writ of certiorari from the United States Court of Appeals for the Seventh Circuit to review that court's judgment and opinions entered on May 12, 1992 and July 28, 1992.

OPINIONS BELOW

The December 18, 1989 decision of the District Court for the Northern District of Illinois, Eastern Division is unpublished but can be found on *Lexis* at 1989 U.S. Dist. LEXIS 15742. The November 30, 1990 decision of the

District Court for the Northern District of Illinois, Eastern Division is unpublished but can be found on *Lexis* at 1990 U.S. Dist. LEXIS 15615. The decision of the May 12, 1992 United States Court of Appeals for the Seventh Circuit decision is published at 962 F.2d 749 (7th Cir. 1992). The July 28, 1992 United States Court of Appeals for the Seventh Circuit Order is unpublished but can be found on LEXIS at 1992 U.S. App. Lexis 17002. All of the cases and decisions are reprinted in the appendices to this petition.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit Order was entered on July 28, 1992. The Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

This case puts in issue:

(a) Section 1 of the Fourteenth Amendment to the United States Constitution:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. Amend. XIV, §1.

(b) The Illinois Civil Service Law, specifically, Ill. Rev. Stat., (1979), ch. 34, §1107, recodified as ch. 34, §3-14013

> Said commissioners shall classify all the offices and places of employment in said county with reference to the examination hereinafter provided for, except

> those offices and places mentioned in section 61.29. The offices and places so classified by the commission shall constitute the classified civil service of said county, and no appointments to any of such offices or places or removals therefrom shall be made except under and according to the rules hereinafter mentioned.

Ill.Rev.Stat. 1941 ch.34 §1110, recodified as ch.34, §3-14016.

> All applicants for offices or places in said classified service, . . . shall be subjected to examination, which shall be public, competitive and open to all citizens of the United States who possess the prerequisites necessary to the performance of the duties of the position, with specified limitation as to residence, age, health, habits and moral character, as stated in the notice of the examination. . . .

(c) The Illinois statutes concerning the management of county hospitals, in pertinent part: Ill. Rev. Stat. ch. 34, § 5020 (1979), now recodified as ch. 34, § 5-37003 and Ill. Rev. Stat. ch. 34, § 5026 (1979) now repealed.

Ill.Rev.Stat. ch.34 §5020 (1979), recodified as ch.34, §5-37003.

> The Board of Commissioners [of Cook County] shall have and exercise all rights, powers and duties heretofore exercised by the Commission [Health and Hospitals Governing Commission (HHGC)]. All books, records, papers, documents, property, real and personal, unexpended appropriations and pending business in any way pertaining to the rights, powers and duties of the Commission [HHGC] shall be transferred and delivered to the Board of Commissioners [of Cook County]. All rights, duties and obligations of the Commission [HHGC] shall become the rights, duties and obligations of the Board of Commissioners [of Cook County].

Ill.Rev.Stat. ch.34, §5026 (1971), repealed.

> . . . The Commission shall adopt rules and regulations based on such principles governing the appoint-

ment, training, promotion, transfers, lay-off, removal, discipline, fringe benefits and welfare of its employees. *Employees performing services in and for the various hospitals and hospital facilities operated by the Commission on July 1, 1970, who held permanent civil service status in the Cook County Civil Service System on said date are deemed to have met all the Merit System requirements of this Act and became merit employees under this Act with the same standing, grade, class or rank which they held in the classified service of Cook County.* . . . Upon the effective date of the amendatory Act, all employees under this Act shall no longer come within the provisions of Civil Service Law of Cook County, Illinois, but instead, shall come within the provision of the merit system provided for in this Act . . . (Emphasis added.)

STATEMENT OF THE CASE

The Respondents, Public Safety Officers at Oak Forest Hospital, sued Cook County, the Cook County Civil Service Commission, and the Cook County Board of Commissioners, to enjoin them from requiring the Respondents to take a Civil Service test to retain their positions at the Hospital. The Respondents had been employed as Public Safety Officers for a number of years before the Civil Service Commission posted the examination notices. The Respondents were not Civil Service employees, but had been Merit Employees under the Health and Hospitals Governing Commission (HHGC), which had operated the Hospital from 1969-1979.

The position of Public Safety Officer I, the position for which the Civil Service Commission had posted examination notices, is an entry level position for which the Civil Service statute requires open and competitive testing

without exception for Civil Service certification. None of the Respondents had ever taken this examination or been certified as competent and able to perform their jobs.

The HHGC was an entity established pursuant to statute in November, 1969, to manage the public hospitals in Cook County, Illinois. Ill. Rev. Stat. ch. 34, §§5000-5025 (1969). Prior to 1969 Cook County operated its Hospitals directly. In December, 1979, the Illinois Legislature abolished the HHGC and Cook County resumed responsibility for operating its hospitals. Ill. Rev. Stat. ch. 34, §5020 (1979).

When the Illinois Legislature initially established the HHGC it did not transfer civil service protected rights to merit employees protected rights. However, in 1970, the legislature passed Ill. Rev. Stat. ch. 34, §5026 (1970), which allowed for the transfer of civil service protected rights. When the Illinois Legislature abolished the HHGC it conferred all rights, duties and obligations of the HHGC to Cook County, but it did not transfer HHGC merit employees' rights to civil service rights. To date, the Illinois Legislature has not conferred Civil Service status upon any former HHGC merit employees. When the Illinois Legislature abolished the HHGC, all former merit employees immediately became *temporary* employees under the Civil Service Commission.

The Respondents filed a three count Amended Complaint against Cook County and the Civil Service Commission, alleging that their discharge for refusing to take the Civil Service test constituted a deprivation of their right to notice and an opportunity to be heard under the Fourteenth Amendment's Due Process Clause. On November 20, 1989, the District Court granted summary judgment for all Respondents save one on the issue of due process.

The Court awarded the successful Respondents $1.00 each in damages.

Both parties timely filed motions to alter or amend the District Court's order. On December 18, 1989, the District Court granted the Respondents' Motion to Alter or Amend the Memorandum Opinion and Order. On December 27, 1989, the Court issued a Memorandum Opinion and Order stating that Ill. Rev. Stat. ch. 34 §5020 (1979) required Cook County to recognize the protected status of the HHGC employees. The Court found that those employees who had protected status under the HHGC did not become Civil Service applicants when jurisdiction of the hospitals reverted back to Cook County. Therefore, since they were not applicants, and already had protected status, the Respondents were not required to take the Civil Service examination.

On November 19 and 20, 1992, the District Court denied the County's motion to clarify, alter or amend its Order. The Court also awarded plaintiffs $69,297.54 in attorneys' fees and costs. The County appealed.

On May 12, 1992, the Seventh Circuit Court of Appeals (Judges Posner, Kane and Engel) affirmed the District Court's decision. On July 28, 1992, the Seventh Circuit Court denied the petition for rehearing *en banc*. The Court also awarded additional attorneys' fees for the appeal in the amount of $7,625.00.

Cook County, the Civil Service Commission of Cook County, the Cook County Board and its Commissioners, and Oak Forest Hospital, seek a *writ of certiorari* to this Court to review the Seventh Circuit's judgment and opinion.

REASONS FOR GRANTING THE WRIT

The Fourteenth Amendment protects against the invasion of individual property rights without due process of law. This Court has long held that the determination of whether a property right exits depends upon state law. By its opinion, however, the Seventh Circuit Court of Appeals has disregarded state law and artificially created a new property right where none previously existed. It has superimposed a property right from a defunct entity onto a viable one with no statutory support for its actions. In so doing, the Seventh Circuit Court has created a new class of employees: those who are neither Civil Service certified or Merit certified, yet are protected nonetheless. That new class, and the protected property rights it enjoys, was created contrary to both state and local law. This Court should therefore grant certiorari in this case to review the nature and extent of the Respondents' Fourteenth Amendment protected property rights in employment.

I.

STATE LAW CONTROLS THE ESTABLISHMENT OF PROPERTY RIGHTS UNDER THE FOURTEENTH AMENDMENT

To maintain an action under Section 1983 based upon a due process claim, the Respondents must show that they were deprived of a constitutionally protected property interest. *Rouse v. Judges of the Circuit Court of Cook County*, 609 F. Supp. 246 (N.D. Ill. 1985). In *Board of Regents v. Roth*, 408 U.S. 564, 576-79 (1972), this Court held that the Fourteenth Amendment protects property interests in specific benefits such as an interest in continuing employment. In *Perry v. Sindermann*, 408 U.S. 593, 601 (1972), this Court explained that "[a] person's interest in a benefit is a 'property' interest for due proc-

ess purposes if there are such rules or mutually explicit understandings that support a claim of entitlement to the benefit and that he may invoke at a hearing."

While the Fourteenth Amendment protects property rights, it does not create them.

> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Roth, 408 U.S. at 577. *See also Mitchell v. Grant*, 416 U.S. 600 (1974). The "sufficiency of a claim of entitlement must be determined by reference to state law." *Bishop v. Wood*, 426 U.S. 341, 344 (1976).

In its decision in this case, the Seventh Circuit acknowledged that Illinois law defines the property interest involved. However, the Court then completely misinterpreted state law and proceeded to create a new property interest where none had previously existed. The Court improperly found every state case addressing the interpretation of Ill. Rev. Stat. ch. 34, §5020 (1979) not controlling or somehow distinguishable. The Court erred.

II.

THE SEVENTH CIRCUIT COURT MISINTERPRETED STATE LAW AND CREATED PROPERTY RIGHTS WHERE NONE PREVIOUSLY EXISTED

The Seventh Circuit Court held that Section 5020 conferred upon the Respondents a protected property right in employment. The language of Section 5020 (now recodified as Section 5-37003), however, provides no basis for such a conclusion. Section 5020 provides:

Duties and powers of board of commissioners

§ 5-37003. Duties and powers of board of commissioners. The Board of Commissioners shall have and exercise all rights, powers and duties heretofore exercised by the Commission. All books, records, papers, documents, property, real and personal, unexpended appropriations and pending business in any way pertaining to the rights powers and duties of the Commission shall be transferred and delivered to the Board of Commissioners. All rights, duties and obligations of the Commission shall become the rights, duties and obligations of the Board of Commissioners.

Ill. Rev. Stat., ch. 34, Section 5020.

A. Section 5020 Did Not Confer Civil Service Status On Former HHGC Merit Employees

Contrary to the Respondents' contention, Section 5020 is silent on the issue of transferring Merit status under the HHGC to Civil Service Status under the Civil Service Commission. Section 5020 applies only to Cook County. Section 5020 does not mention the Civil Service Commission, or the creation of any rights, duties, or obligations with respect to the Commission. Only the Civil Service Commission, not Cook County, has the statutory authority to certify employees into protected Civil Service status. Clearly the Legislature could not have intended to force the Civil Service Commission to accept former HHGC employees as civil service certified pursuant to section 5020 when section 5020 failed to even mention the Civil Service Commission, its rights or obligations.

The Civil Service Commission is a statutory entity, separate and distinct from Cook County. By statute the Commission has the responsibility for and the authority to establish and manage a system for certifying the skills of Cook County employees. Only the Civil Service Com-

mission can establish who has a civil service protected property interest in their job.

The Cook County Civil Service system was created by state statute in 1895 and remained basically unchanged since it was amended in 1941. The Civil Service Act requires that all applicants for offices or places in the classified service *shall be* subjected to examination which *shall be* public and competitive and open to all citizens of the United States. Ill. Rev. Stat. ch.34 §1110 (1989).

As a statutorily created agency, the Civil Service Commission has only such authority as the statute which created it confers upon it. Nothing in the Civil Service Act authorizes the Civil Service Commission to certify any applicant without appropriate testing. The Seventh Circuit Court's ruling that the Civil Service Commission was required to "recognize" civil service status for former HHGC merit employees effectively legislates authority to the Civil Service Commission which it does not possess and negates the existing testing mandate contained in the Act.

The Court's finding that the Respondents working in the position of Public Safety Officer I (PSO I) did not become *applicants* for this PSO I position and therefore, could not be required to take an open and competitive test, is contrary to the legislative mandate of the Civil Service Act. There is no dispute in this case that the PSO I position was an entry level position. The Civil Service Act provides that applicants for both entry level and promotional positions must be certified. The Seventh Circuit Court's decision creates a new class of persons who are entitled to civil service status without ever having to have been tested. This class of individuals thus enjoys a protected property right which others are statutorily denied.

B. The Seventh Circuit Court Decision Ignores The Mandate Of The Civil Service Act

When the HHGC was abolished, all former HHGC employees were reclassified as temporary employees for Civil Service purposes. The Civil Service statute provides that one of the Civil Service Commission's duties is to give open and competitive examinations, conduct investigations, and remove classified employees. Ill. Rev. Stat. ch. 34, pars. 1107, 1110, 1118, and 1121 (1971). *All* non-civil service employees, even those whom Cook County employs in other capacities, are considered "applicants" for civil service classification. Ill. Rev. Stat. (1971), ch. 34, §§1107 and 1116, recodified as ch. 34, §§3-14013 and 3-14022.

The legislature did not specifically exempt the Respondents from the Civil Service Act nor did it amend the Act to allow for some classification other than "applicant" for initial certification or promotional position. Therefore, as temporary employees, the Public Safety Officers became applicants to the Civil Service Commission subject to open and competitive testing. *Levin v. Civil Service Commission of Cook County*, 52 Ill. 2d 516, 288 N.E.2d 92 (1972).

In *Levin v. Civil Service Commission of Cook County*, *supra*, the Illinois Supreme Court held that the legislature, upon creating an office and providing for the employment of a staff, has the authority to prescribe the manner in which that staff is chosen. The Court refused to grant the Respondent preferential status or protected status despite the fact he had been working as a temporary employee in the Assessor's Office for 32 years because extending preferential status was a matter of legislative prerogative.

The Illinois Supreme Court determined in *Levin* that public employees have no property right in public employment and that their length of service as a temporary employee does not effect the nature of that temporary appointment. Temporary public employees have no vested right in the expectation of the continuance of such employment, absent a fixed term of office created by Constitution or statute. The *Levin* Court further noted that incumbent temporary employees *could not be* "grandfathered" into positions after the Civil Service Commission had established an eligible list because the statute did not give temporary employees such a preference; it expressly called for public and open competition. Finally, the Court in *Levin* states further that the application of Civil Service laws did not deprive temporary employees of due process. *Levin*, 52 Ill.2d at p. 524.

When the Seventh Circuit found that the absence of language in Section 5020 transferring merit status to Civil Service Status could be construed as evidencing legislative intent to have former HHGC merit employees automatically treated as civil service protected, it misapprehended that a protected property right existed. A protected property right only occurs when specific Constitutional or statutory language creates or confers it. In this case, no such language exists, even though the legislature clearly could have included it in the statute. The legislature created the HHGC, provided for the employment of its staff, and provided for the manner in which that staff was to be chosen. When the HHGC was abolished, the legislature could have provided for the transfer of employment rights of that staff either by amending the Civil Service Act or by including language in Section 5020 which would have provided for such a transfer. The legislature chose not to do so. It was error for the Seventh Circuit Court to do so.

C. The Seventh Circuit Court Improperly Construed Section 5020

A primary rule of statutory construction is that the court must look to the language of the statute to ascertain the legislative intent. Statutory language must be given its plain, ordinary meaning. If the Legislature had intended to transfer civil service protected status to HHGC employees it would have specifically done so. Indeed, in 1970, shortly after the Legislature had created the HHGC by similar enactment, it amended its legislation to specifically transfer Civil Service status to Merit status under the HHGC. Ill. Rev. Stat. ch. 34, Section 5026 (1970). That the Legislature included no such language in Section 5020 expresses a clear legislative intent not to confer such status on employees who had worked for the HHGC. *Fahey v. Cook County Police Department Merit Board*, 21 Ill. App. 3d 579 (1974) and *City of East Peoria v. Group Fire Development Co.*, 87 Ill. 2d 42 (1977).

The Illinois courts have construed section 5020 in several cases. In *Howard v. County of Cook*, 145 Ill. App. 3d 543 (1986), the plaintiff alleged that she was wrongfully discharged by the County in violation of her rights under the HHGC. The plaintiff had been an employee under the HHGC but quit in 1980 before completing her HHGC probationary period. However, in 1980 when she quit, Cook County had already taken over the operations of the hospitals. Later in 1980, the plaintiff was rehired by Cook County. She was discharged in 1984. In upholding the plaintiff's termination from employment, the Illinois Appellate Court held that although the plaintiff did not complete her HHGC probationary period, there was nothing in Ill. Rev. Stat. ch.34, §5020 (1979) that indicated that merit

status employees were automatically converted back to Civil Service status employees.

In a related case, *Stenzel v. Health and Hospitals Governing Commission*, 50 Ill. App. 3d 545 (1977), the seamstresses employed at Cook County Hospital brought suit to enjoin the HHGC from laying them off according to the HHGC rules and to require the HHGC to lay them off according to Civil Service rules. Although the seamstresses had been employees certified under the Cook County Civil Service Commission, due to the *specific* legislation of Ill. Rev. Stat. ch. 34 §5026 (1971) grandfathering former Civil Service certified employees into the HHGC Merit System, the Court held that the HHGC had its own authority to promulgate rules on layoff and was not bound to follow the Civil Service Commission rules.

In *Peters v. Health and Hospital Governing Commission*, 88 Ill.2d 316, 318 (1982), the Illinois Supreme Court held that the County was not specifically mandated to enter into a labor contract after control over the hospitals reverted to the County from the Health and Hospitals Governing Commission. Although the HHGC, before it was abolished, agreed to sign a labor contract, that contract did not rise to the level of a right, duty or obligation under §5020 *because* there was no specific statutory requirement for the County to negotiate or sign a labor contract. *Id.* at 318.

The Seventh Circuit Court has misinterpreted the foregoing cases. The Court found that the *Peters* decision related only to terms and conditions of employment. If that interpretation of *Peters* was correct, however, the Court in that case would have had to have found that the terms and conditions the HHGC had negotiated with the union were executory and an obligation of the County.

The Seventh Circuit similarly summarily dismissed the *Howard* decision, finding that the statements of the *Howard* court concerning the breadth of the November, 1979, transfer were dicta. Even if the Court's statement was *dicta*, however, it is no less instructive to show the Illinois Appellate Court's interpretation of state law. The *Howard* court's statement that "[n]othing in that legislation indicates that merit employees were automatically converted back to civil service employee status," must not be ignored or automatically discarded when looking to state law for direction. *Howard*, 145 Ill. App. 3d at 543.

The Seventh Circuit also misapprehended the import of the *Fahey* case as it addresses the Board of Commissioners of Cook County or the Civil Service Commission. The *Fahey* court stated that the Merit Board of the Cook County Police Department, (CCPD) could not adopt rules beyond its authority. *Fahey v. Cook County Police Department Merit Board*, 21 Ill. App. 3d 579 (1974). Although the CCPD Merit Board has different statutory authority than the HHGC, it is instructional to show that the Civil Service Commission can not adopt rules beyond its authority. For the Seventh Circuit to grant protected status to merit employees, some of whom may have never been tested for their positions, makes the Civil Service Commission act outside of its statutory authority as it pertains to promotions and discipline.

The Seventh Circuit's misapprehensions concerning the authority and status of state decisional law was plainly error. What is more important, however, is that in committing that error the Court created an entirely new property right in employment. It has created a separate class of individuals who are neither Civil Service employees nor Merit Employees, but are entitled to protected status.

This decision contradicts both the plain language of Section 5020 and current Illinois decisional law.

D. Any Employment Rights Which May Have Existed Under The HHGC Were Extinguished When The Illinois Legislature Abolished That Entity

It is a general principle that when a governmental entity annexes another governmental entity or territory, the ordinances which the annexed entity had in effect become inoperative and of no effect unless they have been saved by express statutory provision. *Rosehill Cemetery Co. v. City of Chicago*, 352 Ill. 11, 25-27 (1933). For example, when the City of Chicago annexed the City of Lake View in 1931, the Lake View ordinances, including those pertaining to cemeteries, became inoperative because the legislature did not save those sections by express language. *Id.* However, when Chicago annexed the City of Hyde Park, where prior to annexation the legislature specifically provided that if annexed the Hyde Park Dram Shop Acts shall continue in full force and effect, the Act did continue in full force and effect. *Harrison v. The People*, 92 Ill. 643 (1900).

The Illinois Supreme Court has held that the Revised Cities and Villages Act, which failed to provide for the transfer of accounts of the retirement fund and a number of other administrative details, did not need to specify every detail of administration, and that it was sufficient if the Act contained general principles with details in the hands of administrators charged with that duty. *Montgomery v. Lierman*, 415 Ill. 32, 42 (1953).

The Revised Cities and Villages Act in *Montgomery* is still much more specific than §5020 which transferred the rights, duties and obligations as they pertain to contracts

with persons and corporations as opposed to employment contracts or agreements. *Peters v. Health and Hospital Governing Commission*, 88 Ill.2d 316, 318 (1982). Additionally, in *Montgomery*, the Supreme Court held that the provisions in the above Act were not vague and were constitutional because the Act did not attempt to amend any other statute or act of the legislature and did not create any unlawful classifications of employees. *Montgomery*, 415 Ill. at p. 42.

The Seventh Circuit's interpretation of Section 5020 automatically conferring civil service status upon the Respondents despite the fact that the Civil Service Act provides for certification of Civil Service status only upon open competitive testing, is in direct conflict with *Montgomery* and in conflict with the general rules expressed in *Rosehill* and *Harrison*. This decision is also contrary to both the *Howard* & *Peters* decisions.

It is not disputed that the Illinois legislature abolished the HHGC in 1979. When it did so, the rights of the employees who had worked for the HHGC were abolished along with that entity. Section 5020 did not provide otherwise. No other statute expressly saved those rights. Therefore, they were abolished. It was error for the Seventh Circuit Court to order Cook County to recognize rights which no longer existed.

III.

THE COOK COUNTY CIVIL SERVICE COMMISSION DID NOT VIOLATE THE RESPONDENTS' DUE PROCESS RIGHTS WHEN IT ANNOUNCED THAT IT WAS HOLDING AN EXAMINATION FOR THE PUBLIC SAFETY OFFICER I POSITION

As the foregoing arguments illustrate, the Respondents had no protected property right in employment, and should not have been granted Civil Service status in this case. Assuming *arguendo*, that such rights did exist, however, the Respondents have failed to indicate the manner in which those rights were violated. They have not shown, nor did the Seventh Circuit Court decide, what process the Respondents were due that they did not receive. Thus, even if the Respondents did have a Fourteenth Amendment right in this case, there was no corresponding Fourteenth Amendment violation.

CONCLUSION

The Fourteenth Amendment protects property rights from deprivation without due process of law. State law defines those property rights. In this case the Seventh Circuit Court of Appeals misconstrued state law when it held that Ill. Rev. Stat. ch. 34, Section 5020 conferred Civil Service status upon the Respondents when the HHGC was abolished. In reaching its decision the Court erroneously created property rights which do not exist under Illinois law. It also created a new class of protected employees who enjoy Civil Service status although they have never been tested by the Civil Service Commission, contrary to the express language of the Civil Service Act. Finally, the Court erred in finding a due process violation absent evidence that the Respondents were denied

any process allegedly due to them For all of these reasons, this Court should grant this petition for writ of certiorari.

Respectfully submitted,

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APPENDICES

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 90-3830

HAROLD J. CARSTON, MICHAEL DEWINTER, LAWRENCE J. DEWINTER, DEAN ECKBERG, DANIEL J. KOKASKA, DONALD MAREVKA, DENNIS MEZERA, JAMES S. OWCZARSKI, WILLIAM PROPER and WALTER S. SCAHILL,

Plaintiffs-Appellees,

v.

THE COUNTY OF COOK, THE CIVIL SERVICE COMMISSION OF COOK COUNTY, THE COOK COUNTY BOARD AND ITS COMMISSIONERS and OAK FOREST HOSPITAL,

Defendants-Appellants.

Appeal from the Unites States District Court
for the Northern District of Illinois, Eastern Division.
No. 83 C 2919—**James B. Moran,** *Chief Judge.*

ARGUED SEPTEMBER 24, 1991—DECIDED MAY 12, 1992

Before POSNER and KANNE, *Circuit Judges,* and ENGEL, *Senior Circuit Judge.**

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* The Honorable Albert J. Engel, Senior Circuit Judge for the Sixth Circuit, is sitting by designation.

KANNE, *Circuit Judge.* Harold J. Carston and the other plaintiffs-appellees are long-time security officers at Oak Forest Hospital in Cook County, Illinois. During the 1970s, Oak Forest Hospital was operated by the Health and Hospitals Governing Commission ("HHGC"). The HHGC granted the security officers civil service protection pursuant to its merit system. In November 1979, the HHGC was abolished by statute and the Hospital became the responsibility of the Board of Commissioners of Cook County ("Cook County"). In 1983, Cook County notified the security officers that it did not recognize their protected status under the HHGC merit system, and that they would be required to take a competitive civil service examination to retain their positions. The officers filed this suit under 42 U.S.C. § 1983 alleging that Cook County's decision to require them to take the civil service examination violated the due process and equal protection clauses of the Constitution of the United States.

The district court granted summary judgment in favor of the security officers, and found that they were protected under the HHGC merit system and that this protection continued pursuant to the statutory transfer to Cook County. Cook County appeals.

I.

All of the officers who prevailed in the district court were hired by Oak Forest Hospital between 1968 and 1979. Some of the officers were hired prior to July, 1970, when the hospital was operated by the County. Each of those officers was certified by the Civil Service Commission pursuant to its rules, which provided that certified employees could be discharged only for cause.

In 1970, when operation of the Hospital was transferred to the HHGC pursuant to ILL. REV. STAT. ch. 34, paragraphs 5011 *et seq.* (1981) (repealed Nov. 30, 1979), all employees who had been previously certified under the Civil Service Commission rules automatically became merit employees under the HHGC by operation of law. For new

employees, the HHGC's merit system specifically provided that merit and fitness would be "ascertained insofar as practical by competitive examination or other techniques of person[ne]l administration based upon merit principles." ILL. REV. STAT. ch. 34, paragraph 5026 (repealed Nov. 30, 1979).

Other officers were hired between July, 1970 and November 30, 1979, while the Hospital was operated by the HHGC. They were hired pursuant to a competitive testing procedure developed by the Hospital pursuant to HHGC merit system requirements. After completing a six-month probationary period, the officers hired after 1970 became career status or "merit" employees pursuant to the merit system rules of the HHGC, and could only be fired for cause.

On November 30, 1979, the HHGC was repealed by statute and Oak Forest Hospital was returned to Cook County. The most important provision of those statutes, paragraph 5020 of Chapter 34 of the Illinois Revised Statutes, provided in part that: "All rights, duties and obligations of the Commission [(HHGC)] shall become the rights, duties and obligations of the Board of Commissioners [(Cook County)]."

After the County regained control of the Hospital it reclassified the security officers as temporary employees. Temporary employees can be discharged at any time and for any reason. The officers, who did not learn of the reclassification until 1983, continued to perform the same duties as they had before.

In February 1983, the Civil Service Commission announced that a civil service examination would be held for the PSO I position at the Hospital. Under the rules of the Civil Service Commission, anyone who successfully completed the examination would be ranked and placed on an eligible list for the PSO I position. Once the examination had been administered, the security officers, who were classified as temporary employees, would be terminated and replaced by members of the eligible list, unless they took the examination and scored higher than

all of the other applicants. The officers filed this suit shortly thereafter.

In a memorandum opinion, the district court granted summary judgment to the officers. The court found that paragraph 5020 had conferred upon the security officers, excluding Kokaska, a protectible property interest in their employment. The district court also ruled that the officers had a protectible property interest in any promotions received under the merit system established by the HHGC, and that the officers did not become applicants upon the transfer of control to Cook County. The court awarded each successful officer $1 in damages and awarded the officers their attorneys' fees.

II.

We review a grant of summary judgment *de novo*. *Pro-Eco, Inc., v. Board of Commissioners of Jay County, Indiana*, No. 90-3336, slip op. at 4 (7th Cir. Feb. 7, 1992); *First Wisconsin Trust Co. v. Schroud*, 916 F.2d 394, 398 (7th Cir. 1990). Summary judgment is appropriate if we can determine that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); *Schroud*, 916 F.2d at 398. In reviewing a district court's decision to grant summary judgment we "view the record and all inferences drawn from it in the light most favorable to the party opposing the motion." *Lohorn v. Michal*, 913 F.2d 327, 331 (7th Cir. 1990).

It is well settled that a property interest in employment "arises if there are 'rules or mutually explicit understandings' to support a claim of entitlement." *Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251, 1263 (7th Cir. 1985) (quoting *Perry v. Sindermann*, 408 U.S. 593, 601, 92 S. Ct. 2694, 2699 (1972)); *see also Bishop v. Wood*, 426 U.S. 341, 344, 96 S. Ct. 2074, 2077 (1976). In *Bishop*, the Supreme Court made it clear that "the sufficiency of the claim of entitlement must be determined by reference to state law." *Id.* Thus, as in *Patkus* and *Bishop*, we must first deter-

mine whether the officers had a right under Illinois law to retain their jobs. *Patkus*, 769 F.2d at 1263.

Cook County concedes that Michael and Lawrence DeWinter, who were hired by Oak Forest Hospital prior to July, 1970, when it was under the jurisdiction of Cook County, attained civil service status. Dennis Mezera was also hired prior to July, 1970; thus, he also attained civil service status. Under paragraph 5026, the HHGC was required to recognize this merit status, when it assumed control of the Hospital in 1970. Thus, as the district court found, these officers clearly attained HHGC merit status.

The other plaintiffs who prevailed in the district court were hired by Oak Forest Hospital between July 1970, and November 1979, when the Hospital was operated by the HHGC. Cook County argues that the Hospital's records are insufficient to confirm that they attained protected status. The district court disagreed, and noted that the officers were not to blame for the sparse employment documentation retained by Cook County. The officers were hired by the HHGC pursuant to a competitive testing procedure. Paragraph 5026 required the HHGC to administer a merit system that provided that merit and fitness would be "ascertained insofar as practical by competitive examination or other techniques of person[ne]l administration based upon merit principles." The HHGC did establish a merit system which provided for entrance and promotional examinations, as well as consideration of previous work experience and/or education. It is undisputed that the HHGC administered tests and that the officers took those tests. The district court found that, although there were few records from the HHGC merit system, the officers clearly attained protected status under that system. Based upon our review of the record, we cannot find fault with this determination.

Finally, we must determine if the district court correctly resolved the status of promotions received pursuant to the HHGC system. The court found that although it is unclear whether those officers promoted were required

to pass additional tests, those promotions were permanent and not temporary or probationary. Cook County does not challenge the factual findings relating to the promotions and we can see no reason to disturb them.[1]

Therefore, it is clear that the HHGC merit system, which gave the prevailing officers the right not to be discharged but for cause, established a protectible property interest in continued employment, which is protected by the due process clause. *Patkus*, 769 F.2d at 1263; *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538-39, ____ S. Ct. ____, ____ (1985). We must next decide whether Cook County was obligated to recognize that protectible property interest when it reacquired control of Oak Forest Hospital in 1979.

Cook County argues that it had no such obligation because paragraph 5020 did not explicitly protect the officers' employment rights. Cook County points out that the 1971 statute which transferred Oak Forest Hospital to the HHGC, paragraph 5026, specifically protected the merit status of the employees transferred to the HHGC. From this, Cook County reasons that when it enacted paragraph 5020 nine years later, the Illinois legislature did not intend that the merit status of the HHGC employees be transferred to the County.

Because paragraph 5020 did not specifically mention the security officers, we cannot find that the Illinois Legislature specifically intended to divest them of the merit status they earned while employed by the HHGC. We do not believe that legislative silence on this issue can be equated with specific intent.

Cook County similarly contends that paragraph 5020 only transferred real and personal property, unexpended appropriations and pending business, and not employment

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[1] The district court did not decide whether the officers had a protectible property interest in any promotions they had received after December 1979, when the County regained control of the Hospital. Therefore, we do not address that issue.

obligations. The County relies on *Peters v. Health & Hospitals Governing Commission*, 430 N.E.2d 1128 (Ill. 1981), *cert. denied*, 459 U.S. 826, 103 S. Ct. 60 (1982), as support for that proposition. In *Peters*, the Illinois Supreme Court considered whether labor agreements to which the HHGC had been a party were enforceable against Cook County. The court declined to specifically enforce against Cook County a term in the agreements, under which the HHGC was obligated to bargain in good faith with certain employees. *Id.* at 1129-1130. The court noted that: "[t]his record presents no question of the enforcement of specific contractual provisions concerning wages, hours, conditions of employment . . . ." *Id.* As the officers argue, that language certainly distinguishes *Peters* from this case. Indeed, the *Peters* court indicated that paragraph 5020 *does apply* to terms and conditions of employment. *Id.*

Cook County also places mistaken reliance on *Howard v. County of Cook*, 495 N.E.2d 1166 (Ill. App. 1986). In *Howard*, the plaintiff worked at Cook County Hospital from September, 1979, until May or June, 1980, when she resigned. She was evidently rehired after applying for a job in September, 1980, but was fired later. *Id.* at 1167. The plaintiff contended that her merit status was transformed into civil service status by the November 1979 transfer legislation. Although, as Cook County points out, the court did state that "[n]othing in that legislation indicates that merit employees were automatically converted back to civil service employee status," *id.* at 1170, that statement was clearly dicta. The court also found that the plaintiff had not attained merit status for two other reasons. *Id.*

Also distinguishable is *Grobsmith v. Kempiners*, 430 N.E.2d 972 (Ill. 1982), in which the court upheld a statute which altered the duration of certain civil service appointments. *Id.* at 975. The court stated: "It is well established that civil service status is not a vested right, that having been created by the General Assembly it is wholly within its control and subject to change by legislative action." *Id.* This case is different because the legislature has not attempted to change the civil service status of

the employees. As we noted above, the most reasonable interpretation of paragraph 5020 is that it conferred on the officers a protectible property interest in their employment.[2]

Cook County's second argument is that the district court's interpretation of paragraph 5020 improperly delegates authority to the Cook County Civil Service Commission in violation of Chapter 34, § 3-14016, ILL. REV. STAT. ch. 34, § 3-14016 (1992), because the district court required the Commission to certify the civil service status of the officers. The County notes that the Civil Service Statute does not authorize the Civil Service Commission to certify an employee into merit status without testing. The district court did not order Cook County to certify the officers as merit employees, and the Commission is under no obligation to certify them. Cook County and the Commission are prohibited from violating the officers' due process rights. Even if the district court had ordered that the officers be certified, that would not change our interpretation of paragraph 5020. Simply put, because paragraph 5020 was enacted *after* the Civil Service Act took effect, it controls if it conflicts with the Civil Service Act.

Moreover, the Cook County Civil Service Commission can only test *applicants* for positions. ILL. REV. STAT. ch. 34, § 3-14016. We have held that Cook County may not treat the officers as applicants for their positions. Thus, the Civil Service Commission has no statutory authority

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[2] *Stenzel v. Health and Hospitals Governing Commission*, 365 N.E.2d 1076 (Ill. App. 1977) is also inapposite. In *Stenzel*, the plaintiffs, who were civil service employees, sought an injunction barring the HHGC from terminating them pursuant to a lay-off plan. The court held that the HHGC was not required to grant the plaintiffs the same seniority status they enjoyed under prior Civil Service Rules and Regulations, *id.* at 691, because the legislation that created the HHGC merit system specifically authorized the HHGC to regulate lay-offs. *Id.* at 692. Here, we have a different situation because paragraph 5020 did not authorize Cook County to give temporary status to the former HHGC employees.

to subject the officers to examinations to retain their positions. *Fahey v. Cook Co. Police Dep't Merit Board*, 315 N.E.2d 573, 577-78 (Ill. 1974) (rules, which were adopted, were beyond Board's authority and therefore void.). Thus, we hold that the district court properly granted summary judgment to the officers, excluding Kokaska.[3]

III.

In the alternative, Cook County challenges the award of attorney's fees to the officers pursuant to 42 U.S.C. § 1988. "Because of the factual nature of attorney's fee awards, appellate review is limited to a 'highly deferential abuse of discretion standard.' " *Leffler v. Meer*, 936 F.2d 981, 985 (7th Cir. 1991) (quoting *Dutchak v. Central States, S.E. & S.W. Areas Health & Welfare Fund*, 932 F.2d 591, 596 (7th Cir. 1991)); *Biggs v. Village of Dupo*, 892 F.2d 1298, 1305 (7th Cir. 1990).

Cook County does not dispute that the officers were the prevailing parties in this litigation, but argues that the award of fees was inflated because the officers succeeded only on one of their claims for relief. We agree with the district court that each claim presented "an alternate road to the same result." Moreover, the district court noted that it did not need to consider the alternate claims made by the officers because they prevailed on their due process claims.

Second, Cook County argues that the fees awarded were excessive because the officers used several lawyers who

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[3] Kokaska was not employed until after Cook County resumed control of Oak Forest Hospital in 1979. Nevertheless, he took the HHGC merit examination and understood that that was sufficient to protect his status. The district court entered summary judgment in favor of Cook County and against Kokaska. Kokaska filed a notice of appeal in this court as an *appellee*, and he has not argued that the judgment against him should be reversed. Thus, we affirm the district court's order granting summary judgment to Cook County on Kokaska's claims.

may have duplicated some work. The district court found that the officers' decision to use several lawyers was well founded, and reduced their fees slightly to account for any duplication. The district court also reduced the fees of the officers' counsel in part because one plaintiff did not prevail, and others were dismissed. We cannot find fault with those determinations because the district court had a better opportunity than we do to observe the officers' counsel in action. In sum, we hold that the district court did not abuse its discretion in awarding fees to the officers.

IV.

Therefore, we AFFIRM the judgment in favor of the officers and the award of attorney's fees.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: May 12, 1992

BEFORE:

Honorable Richard A. Posner, Circuit Judge
Honorable Michael S. Kanne, Circuit Judge
Honorable Albert J. Engel, Senior Circuit Judge*

No. 90-3830

HAROLD J. CARSTON, MICHAEL DEWINTER, LAWRENCE J. DEWINTER, et al.,

Plaintiffs-Appellees

v.

COUNTY OF COOK, CIVIL SERVICE COMMISSION OF COOK COUNTY, COOK COUNTY BOARD, and its Commissioners, et al.,

Defendants-Appellants

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 83 C 2919, Judge James B. Moran

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this court that the judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered this date.

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* The Honorable Albert J. Engel, Senior Circuit Judge for the Sixth Circuit, is sitting by designation.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 28, 1992.

Before
Hon. RICHARD A. POSNER, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge
Hon. ALBERT J. ENGEL, Senior Circuit Judge*

HAROLD J. CARSTON, MICHAEL DeWINTER, LAWRENCE J. DeWINTER, et al.,

Plaintiffs-Appellees,

No. 90-3830 v.

COUNTY OF COOK, CIVIL SERVICE COMMISSION OF COOK COUNTY, COOK COUNTY BOARD, and its Commissioners, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 83 C 2919 — James B. Moran, Chief Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Albert J. Engel, Senior Circuit Judge for the Sixth Circuit, is sitting by designation.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
August 5, 1992

Before
Hon. MICHAEL S. KANNE, *Circuit Judge*

HAROLD J. CARSTON, MICHAEL DEWINTER, LAWRENCE J. DEWINTER, et al.,

Plaintiffs-Appellees,

No. 90-3830 v.

COUNTY OF COOK, CIVIL SERVICE COMMISSION OF COOK COUNTY, COOK COUNTY BOARD, and its Commissioners, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 83 C 2919 — James B. Moran, Chief Judge.

This matter comes before this court for its consideration of the following:

1. "PETITION FOR ATTORNEYS' FEES" filed herein on May 26, 1992, by counsel for the appellees.

2. "DEFENDANT'S RESPONSE TO PLAINTIFF'S PETITION FOR COSTS AND ATTORNEY'S FEES" filed herein on June 18, 1992, by counsel for the appellants.

On consideration thereof,

IT IS ORDERED that fees in the amount of $7,625.00 are hereby awarded to counsel for the appellees.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 83 C 2919 Date: Nov. 19, 1990

Name of Assigned Judge: JAMES B. MORAN

Case Title: HAROLD J. CARSTON ET AL vs
THE COUNTY OF COOK ETC. ET AL.

* * * * *

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

Enter Memorandum and Order. Defendants' motion for clarification is denied. We reduce Gerske's fees by five percent and those of other counsel by two per cent. We thus award Douglas fees in the amount of $950, Gerske fees in the amount of $47,025 and Chapman in the amount of $13,387. We are not told why the costs are improper, and we enter costs of $3,378.54.

* * * * *

(12) ☒ (For further detail see ☒ order attached to the original minute order form.)

[Dated November 19, 1990]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 83 C 2919

HAROLD J. CARSTON, HAROLD WINTER, LAWRENCE J. DE WINTER, DEAN ECKBERG, DANIEL J. KOKASKA, DONALD MAREVKA, DENNIS MEZERA, JAMES S. OWCZARSKI, WILLIAM PROPER and WALTER S. SCAHILL,

Plaintiffs,

vs.

THE COUNTY OF COOK, THE CIVIL SERVICE COMMISSION OF COOK COUNTY, THE COOK COUNTY BOARD and its Commissioners, and OAK FOREST HOSPITAL,

Defendants.

MEMORANDUM AND ORDER

Almost a year ago this court decided cross-motions for summary judgment and, except for an expected fees position, we thought the matter had been laid to rest. Not so. Plaintiffs wanted further clarification, which we provided on December 27, 1989. They also did seek attorneys' fees, an issue which has been languishing, or at least pending, since May. In reviewing the submissions we were reminded (we have a vague recollection of having some prior knowledge) of various other matters which are also pending.

One is a detailed defendants' motion for clarification, which triggered both a response and a proposed judgment order granting relief beyond the scope of the November 20, 1989 decision. The central issue there was whether or not plaintiffs, by virtue of ¶5020, had a protectible property interest in their employment. We concluded that they did. Some had protected status from their initial employment by the County, which continued when HHGC took over the system and, we concluded, continued when control reverted to the County. Others were hired by HHGC, remained employed after a probationary period and therefore attained protected status, and also continued to have protected status after November 1979.

We are uncertain of the necessity for more detailed findings. HHGC operated the system for approximately a decade. Employees were, one way or another, promoted during that period. The HHGC merit system was, apparently, administered in a less controlled manner than is the present merit system. Formal testing is not, however, the only way to implement merit promotion. In private industry, periodic job performance evaluations are, we believe, far more dominant in promotion decisions than is testing. Here some plaintiffs came into the County system in positions they had filled during HHGC operation, without, apparently, any indication that the promotion had been temporary or probationary. Those were, therefore, the protected positions when the County took over, with those plaintiffs having the same rights and the same opportunities for advancement as other employees holding those positions.

Other plaintiffs have received promotions since December 1, 1979. The status of those promotions is uncertain. The defendant contends that they are temporary, while plaintiffs contend that they now have become permanent.

If they are temporary only because, for example, they had not previously passed an HSO I test, and employees who passed an HSO I test and have since been promoted to HSO II without further testing are considered as permanently certified HSO II employees, then those plaintiffs are entitled to the same protection as the other employees. If, however, the County requires that all employees it has promoted to HSO II pass an HSO II test for permanent certification, then the requirement is applicable to plaintiffs as well as other employees.

Perhaps employees at Oak Forest Hospital who have been promoted by the County are entitled to protection against demotion even if they have not passed a competitive examination. That argument can be made on the basis of *Forest Preserve District of Cook County v. Illinois Local Labor Relations Board*, 190 Ill.App.3d 283, 137 Ill.Dec. 730, 546 N.E.2d 675 (Ill.App. 1st Dist. 1989), *appeal denied*. An estoppel theory rests, however, not on the plaintiffs' protected status as HHGC employees but on their length of service since being promoted as County employees, circumstances they share with other County employees. That was not, however, the issue in the complaint filed here. Plaintiffs now wish to make it an issue by amended complaint. That we decline to do. Perhaps it can be argued that state estoppel concepts create constitutionally protected property interests, and perhaps state estoppel concepts operate to protect those who have long been employed by the County in a higher grade. But the claims brought here by former HHGC employees (and this is not a class action) have long since been decided, and we see little reason to now consider additional claims requiring a federal court to determine somewhat murky state law questions when a more appropriate forum is available in the event the County decides not to continue

those plaintiffs in their present positions. The state law issue is further complicated by the agreed injunction in this case which was a basis for continuing the plaintiffs in their present positions. Even more compelling is the argument against amendment to add a pendent count for Kokaska. When the federal issues are decided short of trial pendent claims, except in unique circumstances, are dismissed without prejudice. The motion to amend is denied.

We come, then, to plaintiffs' fee petition. Plaintiffs' counsel ask for $69,703.75, the lodestar amount. Defendants contest it upon a variety of grounds. Before we reach those contentions we should trace, briefly, the rather uncommon procedural history of this action. The plaintiffs (and over the course of time they have changed somewhat) were originally represented by Loretta C. Douglas. This court, after extensive briefing, rejected her original concepts and dismissed the claims not long after she had withdrawn to become a state court judge. She did, however, achieve one significant benefit for the plaintiffs which, by hindsight, may also have been of significant benefit to the defendant. Efforts to obtain injunctive relief led ultimately to an agreed standby order which left the plaintiffs in their then positions. That meant that the plaintiffs suffered only nominal damages and their ultimate monetary recovery was $1 each. Without that order the County may have terminated them after testing, or, in some instances, demoted them, thus leading to very substantial damages.

Janet F. Gerske replaced Judge Douglas as lead counsel, and she enlisted James P. Chapman as a more seasoned backup. He, in turn, relied to some extent upon his associate, Alan Mills, and, to a lesser extent, used paralegals. Douglas asks for $968.75 for 7.75 hours of court time at $125 per hour and $4600 for 46 hours of office time at

$100 per hour; Gerske asks for $49,500 for 396 hours at $125 per hour; James P. Chapman asks for $13,660, $7,380 for his 36 hours at $205 per hour, $5705 for Mills' 40.75 hours at $140 per hour and $575 for 11.5 hours of paralegal time at $50 per hour. Because plaintiffs' counsel have already received $1,125 for time included in the calculations, the total amount requested is $68,178.75.

Defendant contends, for a long list of reasons, that the amount is seriously inflated. It argues that plaintiffs prevailed on only one of three claims. But each of those claims was an alternate road to the same result and all were intertwined. The contract and equal protection claims, while part of the discovery, were not the focus of the court's attention, and we did not need to consider them. Perhaps they were meritorious and plaintiffs would have prevailed upon them if it had been necessary to reach them, but it was not necessary to do so. Those circumstances are not a basis for a diminution of fees.

Defendant also argues that plaintiffs prevailed only in a limited sense since they each received only $1. But that ignores the fact that defendant had earlier agreed to maintain the status quo during the lawsuit. If it had not so agreed and if plaintiffs had been demoted or terminated in the interim, the damages would have been very substantial. The defendants had the good sense to so agree, in response to plaintiffs' petition for preliminary injunctive relief, thus substantially reducing their overall liability, but the result was that plaintiffs preserved their status as a result of the lawsuit and there may well be an impact from the court's ruling upon other employees. Plaintiffs prevailed in a significant way.

It is also contended that multiplicity of counsel, duplication of efforts and high fees all make the request un-

reasonable, and that the records are inadequate to sustain the requests. Perhaps we would have asked for more at the outset if this had been a sprawling class action with expectable fee requests in the millions of dollars. But here the rates requested are well within what is reasonable in the district, the backup is in line with what attorneys submit to private clients, and the indications of substantial duplication just isn't there. Perhaps if Gerske had not enlisted Chapman's help there might have been saved a few hours of conferring between them, but this court does not fault her decision to seek experienced help in what had become a very hotly-contested lawsuit with significant implications, and some startup time and conferring was an inevitable consequence. We note that, so far as we have determined, plaintiffs have charged for only one attorney at status calls and other court appearances, conferences with clients and depositions, although it is the court's recollection that more than one attorney was sometimes in court. Defendant now claims that the sole issue was a simple matter of statutory interpretation, but that was not the position it took along the way, as the size of the file attests. Finally 11½ hours of paralegal time over the past five years is clearly not unreasonable.

We do note, however, that one plaintiff did not prevail and that others were dismissed out along the way. We also note that some of Gerske's 1990 time relates not just to defending against defendant's post-decision motions but also to seeking to raise old issues again or new issues, upon which plaintiffs did not prevail. The unsuccessful pursuit of Kokaska's and others' claims took some time prior to 1990, although it was undoubtedly inconsiderable in light of the commonality of interests, and the unsuccessful pursuit of Kokaska's claims in 1990 expended some minor time. We reduce Gerske's fees by five per cent and those

of other counsel by two per cent. We thus award Douglas fees in the amount of $950, Gerske fees in the amount of $47,025 and Chapman in the amount of $13,387. We are not told why the costs are improper, and we enter costs of $3,378.54.

/s/ JAMES B. MORAN
James B. Moran, Chief Judge
United States District Court

Dated: November 19, 1990

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 83 C 2919 Date: Nov. 20, 1989

Name of Assigned Judge: JAMES B. MORAN

Case Title: HAROLD J. CARSTON ET AL. vs
THE COUNTY OF COOK ETC. ET AL.

* * * * *

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

Enter Memorandum and Order. We grant plaintiff's motion for summary judgment with respect to all plaintiffs other than Kokaska and deny it as to him, and we deny defendants' motion for summary judgment with to all plaintiffs other than Kokaska and we grant it as to him.

* * * * *

(12) ☒ (For further detail see ☒ order attached to the original minute order form.)

[Dated November 20, 1989]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 83 C 2919

HAROLD J. CARSTON, HAROLD WINTER, LAWRENCE J. DE WINTER, DEAN ECKBERG, DANIEL J. KOKASKA, DONALD MAREVKA, DENNIS MEZERA, JAMES S. OWCZARSKI, WILLIAM PROPER and WALTER S. SCAHILL,

Plaintiffs,

vs.

THE COUNTY OF COOK, THE CIVIL SERVICE COMMISSION OF COOK COUNTY, THE COOK COUNTY BOARD and its Commissioners, and OAK FOREST HOSPITAL,

Defendants.

MEMORANDUM AND ORDER

Plaintiffs are long-time security officers at Oak Forest Hospital. For most of the '70s it was one of the facilities operated by the Health and Hospitals Governing Commission (HHGC). In November 1979 the HHGC was abolished by statute and the hospital became the responsibility of the Board of Commissioners of Cook County (Cook County). Plaintiffs claim that they were protected under the HHGC merit system and that protection continued, pursuant to the statutory transfer to Cook County. Cook County contends that the plaintiffs do not have that protection and

that they must qualify for their positions through competitive civil service examinations. Plaintiffs assert that they have continuing contract rights to protect status and that the threat of discharge without cause violates both procedural due process and equal protection rights.

The County operated the hospital until 1969 and some of the plaintiffs were, during that period, certified as security officers. Three of them continued in entry-level employment throughout the HHGC period and into the County's resumption of operational control. They requested reinstatement to their prior certification; those requests were granted and they have dismissed their claims. Others were promoted during the HHGC period (and some of them were hired during that period as well). Finally, one plaintiff, Kokaska, was not employed until after Cook County resumed control, although he apparently took the HHGC test and was told that was sufficient to protect him.

In one sense, this case is a state law case dressed up in constitutional terminology. The County agrees that if plaintiffs obtained a protected status during the HHGC days, and if the County was obligated to recognize that status, then they do indeed have property rights which the County constitutionally must recognize here. The County argues, however, that it isn't at all clear that the plaintiffs had protected status during the HHGC days (we pass Kokaska for the moment) and that, even if they had, the statutory transfer of control in 1979 did not continue that protected status. Accordingly, plaintiffs have no constitutionally-protected property righs in their employment created by state law.

The uncertainty about plaintiffs' HHGC status arises from the paucity of records that the HHGC turned over

to the County or that were found in 1979. There is no dispute, however, that—at least from 1970 or 1971 on—HHGC was required to administer a merit system that provided that merit and fitness would be "ascertained insofar as practical by competitive examination or other techniques of personal [sic] administration based upon merit principles," and that prior civil service employees were grandfathered into the new system. Ill.Rev.Stat. ch. 34, ¶5026 (repealed Nov. 30, 1979). It is also undisputed that HHGC did establish a merit system which provided for entrance and promotional examinations, as well as consideration of previous work experience and/or education, that tests were in fact administered, and that the plaintiffs hired during that period took those tests (although it is not at all clear that those promoted had to pass additional tests). While the system in place during the HHGC days may have been less rigorous than the present procedures, we believe that the paucity of records (for which the plaintiffs cannot be faulted) cannot defeat the conclusion that HHGC had a merit system which protected plaintiffs other than Kokaska.

The real issue is whether Cook County is obligated to recognize that protected status. Cook County claims that it is not and that, upon the transfer of control, all HHGC employees become subject to the civil service system. For awhile it appeared that the effect might be to require employees to establish minimum qualifications. Now it has been settled that all became, in effect, temporary employees employed at will and are required to establish their qualifications. For some, as we have noted, recertification is possible. For others, licensing appears to be enough. For plaintiffs, however, and many other former HHGC employees, the route has been, or will be, competitive examinations for all applicants, in which the advantages of incumbency are muted.

Plaintiffs suggest that government cannot change the rules, that public employees who once gain civil service protection are forever protected, regardless of how desirable the legislature believes a change in the system to be, for example, by relating promotion more to work evaluation than to testing. We have grave doubts that the Constitution requires such rigidity, *see Carston v. The County of Cook*, 83 C 2919 (slip op. 6/10/85, p.3, fn.1); *Bara v. Aurora Civil Service Commission*, 580 F.Supp. 212, 215 (N.D. Ill. 1983), *aff'd without published opinion*, 774 F.2d 1166 (7th Cir. 1985), *cert. denied*, 474 U.S. 995 (1985). But did the legislature change the rules here?

As part of the transfer the legislature provided that "all rights, duties and obligations of the [HHGC] shall become the rights, duties and obligations of the Board of Commissioners [Cook County]." Ill.Rev.Stat. ch. 34, ¶5020. Defendants argue that the provision passes on bond, malpractice and other such legal liabilities, not employment obligations. They point out that the legislature was far more explicit when it acted to grandfather former county employees into the HHGC merit system, and they rely heavily upon the fact that the Civil Service Commission (CSC) is a separate body with its own statutory mandates to operate a civil service system, and the provision does not expressly apply to the CSC. They have, as well, a one-sentence dictum in *Howard v. County of Cook*, 145 Ill. App.3d 538, 495 N.E.2d 1166, 1169 Ill.Dec. 431 (1st Dist. 1986), to support their position.

The Illinois Local Labor Relations Board has, in two decisions relating to a different facet of this dispute (whether the duty to bargain encompasses subjects within the mandates of the CSC respecting hospital employment), treated the CSC as an instrumentality of Cook County, which decisions defendants dismiss as agency decisions not

on the issues presented here and not binding on this court. We have, however, more recently a judicial decision—albeit on that same unrelated subject—in which the court held that the bargaining duty took precedence over the CSC mandates, *Forest Preserve District of Cook County v. Illinois Local Labor Relations Board* (1st Dist. slip op. 10/27/89). There, even though the CSC was one of the defendants, the court did not consider it necessary to discuss its status as an entity separate from Cook County.

The court went on there to determine that the County was estopped from applying "new hire" rules to long-time employees. No such argument is made here, and we question its applicability in a constitutional claim. Nevertheless, that the County acquired approximately 7500 employees in 1979, many of whom had made hospitals their career, that they had had protected status both with the County before HHGC and then with HHGC, and most were performing satisfactorily (and the County does not contend that plaintiffs were performing unsatisfactorily when it resumed control or during the decade since), all counsel caution, in concluding that ¶5020 does not mean what it appears to say and that all those employees became "applicants" in 1979.

Kokaska is, however, in a different posture. He took an HHGC test but he was not employed until after Cook County resumed control. The County cannot be estopped by what a supervisor may have said about his belief of the effects of that test. Kokaska was, from the start, a Cook County employee and subject to its procedures. Those procedures have, from inception, required an applicant—and that includes a temporary employee—to be certified and, as yet, he has not been.

We grant plaintiff's motion for summary judgment with respect to all plaintiffs other than Kokaska and deny it as to him, and we deny defendants' motion for summary judgment with respect to all plaintiffs other than Kokaska and we grant it as to him. We see no reason to reach plaintiffs' equal protection argument in the circumstances. Finally, this has been, at all times, we believe, a procedural due process issue concerning a threatened deprivation. No one has been discharged or demoted. Promotions require the development of testing procedures common to all. We believe, in those circumstances, that the prevailing plaintiffs are each entitled to $1 in damages, *Carey v. Piphus*, 435 U.S. 247 (1978), and we see no reason to delay entering judgment for those amounts. We anticipate, of course, that the prevailing plaintiffs will seek attorneys' fees, but we leave that for another day.

/s/ JAMES B. MORAN
James B. Moran
Judge, United States District Court

Dated: November 20, 1989.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 83 C 2919 Date: Dec. 24, 1987

Name of Assigned Judge: JAMES B. MORAN

Case Title: HAROLD J. CARSTON ET AL vs
THE COUNTY OF COOK ETC. ET AL.

* * * * *

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

Enter Memorandum and Order. Defendants objected to plaintiffs taking several depositions, Magistrate Balog overruled the objections, defendants appealed, and we affirm. Status hearing set for February 5, 1988 at 9:45 a.m.

* * * * *

(12) ☒ (For further detail see ☒ order attached to the original minute order form.)

[Dated December 24, 1989]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 83 C 2919

HAROLD J. CARSTON, et al., Plaintiffs,

vs.

COUNTY OF COOK, et al., Defendants.

MEMORANDUM AND ORDER

Defendants objected to plaintiffs taking several depositions, Magistrate Balog overruled the objections, defendants appealed, and we affirm.

Defendants raised a "privilege" objection before the magistrate and he declined to deal with it on the then sketchy record. They raise it again here and specify that what they are talking about is the deliberative process privilege. It is, however, unlikely that the issue here relates to that privilege—there has been no formal assertion of a privilege respecting internal communications and the depositions will not require disclosure of internal documents. There may well be a question whether the then state of mind of participants in a group decision is relevant to equal protection analysis, which usually, at least in legislative situations, focuses not on actual motivation but possible rational distinctions. But that is not the issue before us. We are advised that all the remaining depositions should not take longer than two days in all. In view

of that representation, the magistrate quite properly directed the parties to depose first and argue admissibility later, and his decision is affirmed.

/s/ JAMES B. MORAN
James B. Moran,
Judge, United States District Court

Dated: December 24, 1987.

Supreme Court, U.S.
FILED
NOV 30 1992
OFFICE OF THE CLERK

No. 92-788 (2)

In The

Supreme Court of the United States

October Term, 1992

THE COUNTY OF COOK, THE CIVIL SERVICE COMMISSION OF COOK COUNTY, THE COOK COUNTY BOARD AND ITS COMMISSIONERS and OAK FOREST HOSPITAL,

Petitioners,

vs.

HAROLD J. CARSTON, MICHAEL DEWINTER, LAWRENCE J. DEWINTER, DEAN ECKBERG, DANIEL J. KOKASKA, DONALD MAREVKA, DENNIS MEZERA, JAMES S. OWCZARSKI, WILLIAM PROPER and WALTER S. SCAHILL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

SUMMARY OF ARGUMENT

Respondents respectfully submit that the Court need read no further than the Table of Authorities submitted by Petitioners to determine that this case does not raise *any* question of federal law. Petitioners do not cite one pertinent federal decision or statute. Rather, the case turns entirely upon the interpretation of an obscure state statute with limited application.[1] No question of federal law is presented. There is no reason for this Court to review the decisions by the District Court and the Court of Appeals for the Seventh Circuit (which, Respondents submit, are clearly correct) of state law.

REASONS FOR DENYING THE WRIT

The County's presentation of the case makes a very simple case unduly complicated. Respondents have been employed as security guards at Oak Forest Hospital for many years. Prior to 1979, the Oak Forest Hospital was operated by a unit of local government created by Illinois statute known as the Health and Hospitals Governing Commission ("HHGC"). There is no question that prior to 1979 each of the Respondents had a protected property

[1] In fact, the local nature of this case is admitted by Petitioners: for example, in their Questions Presented (p. i), Petitioners refer only to an erroneous construction of state law; their second argument (p. 8) contends that the Seventh Circuit Court of Appeals "misinterpreted *state* law * * * " (emphasis added); in their conclusion (p. 18), Petitioners repeat their contention that "the Seventh Circuit Court of Appeals misconstrued state law * * * ."

right in continued employment which was protected by the due process clause. *Carston v. County of Cook*, 962 F.2d 749 (7th Cir. 1992); App. 6

In 1979, the Illinois Legislature abolished HHGC and transferred responsibility for Oak Forest Hospital to Cook County. As part of the group of statutes enacted to effect this transfer, the Illinois Legislature enacted Illinois Revised Statutes, Chapter 34, Paragraph 5020, which provided, in pertinent part:

> All rights, duties and obligations of [HHGC] shall become the rights, duties and obligations of the Board of Commissioners [of Cook County].

The sole issue in this case (and the issue that the Respondents request the Court to review) is whether this language transferred the property rights which Respondents admittedly had in their continued employment prior to 1979 to Cook County.

Both the District Court and the United States Court of Appeals for the Seventh Circuit held, based on their interpretation of the statute and the binding interpretations of the Illinois Supreme Court, that the Illinois Legislature meant exactly what it said: *all* obligations of HHGC became the obligations of the County of Cook, including HHGC's obligations to security guards who are Respondents herein.

Petitioners' tortured reading of Paragraph 5020 was rejected by both the District Court and the United States Court of Appeals for the Seventh Circuit. There is no reason for the Court to revisit this issue.

CONCLUSION

The instant petition presents no issue of federal law. The District Court and the Seventh Circuit Court of Appeals properly construed state law. The petition should be denied.

Respectfully submitted,

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